MALAYAN BANKING BHD., EX PARTE

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CODE NO. D3-29-4763-90]
4 NOVEMBER 1991

BANKRUPTCY: *Bankruptcy petition - Whether petition invalid because verifying affidavit was affirmed before petition presented - Bankruptcy Act, ss. 6(1), 93(4) and 131 - Bankruptcy Rules 1969, rr. 99(1), 102, 106(1).*

COMPANY LAW: *Winding up - Petition for winding up - Time for affidavit to be sworn and filed - Companies (Winding up) Rules 1972, r. 26.*

The issue in this case is whether the creditors' bankruptcy petition was valid because the relevant affidavit was affirmed before the petition was presented.

Held:

[1] The petition was not invalid merely because the verifying affidavit was affirmed before the petition was presented. At worst, there was nothing more than a formal defect or an irregularity. Sections 93(4) and 131 of the Bankruptcy Act could be invoked and leave can be given (which was given in this case) to file a fresh verifying affidavit.

[2] Neither the Bankruptcy Act nor the Bankruptcy Rules prescribe when the affidavit verifying the bankruptcy petition is to be sworn and filed. Rule 99(1) provided that "every petition shall be dated and witnessed", r. 102 provides that "every bankruptcy petition shall be attested", whilst r. 106 merely state that "a creditor's petition shall be verified by affidavit". This is in contrast to the time for swearing and filing the affidavit in respect of a winding up petition, which is expressly prescribed as being "within four days after the petition is presented".

[3] Although in the instant case, the Court had allowed the petitioner to re-swear the affidavit, there was in fact no need for such re-swearing. The affidavit, as it stood, had duly met the requirements of the law.

Cases referred to:

Chin Yoon Timber Co. v. Overseas Lumber Bhd. [1978] 2 MLJ 173 ***(cons)***
Sobri b. Arshad v. Associated Tractors Sdn. Bhd. [1991] 3 CLJ (Rep) 756 ***(dist)***
Re Western Benefit Building Society 55 ER 409 ***(cons)***
Sari Atlantic Sdn. Bhd. v. Aik Kim Enterprise [1988] 1 MLJ 201 ***(cons)***
Sam Hin Timber Co. v. Perusahaan Sri Duyong Sdn. Bhd. [1983]CLJ (Rep) 383

Legislation referred to:

Bankruptcy Act 1967, ss. 6(1), 93(4), 131
Bankruptcy Rules 1969, rr. 99(1), 102, 106
Companies (Winding-up) Rules 1972, rr. 26, 193, 194
Companies Act 1965, s. 221(2)

For the petitioner (applicant) - Lua Ai Siew; M/s. Soo Thien Ming & Shahrizat

JUDGMENT

VC George J:

In these bankruptcy proceedings the petition was dated 5 March 1991 on which date it was signed on behalf of the petitioner by its branch manager Phong Ken Pin in the presence of an advocate and solicitor who duly attested the petition by signing it as witness. On the same day, 5 March 1991, the said Phong Ken Pin affirmed an affidavit verifying the petition. The original copy of the petition was annexed to the verifying affidavit. The petition and the said affidavit were filed in Court on the 13 March 1991 on which date the required deposit of RM300 had been effected with the Official Assignee whose receipt for the same was as is required produced to the Registry of the Court.

Apparently the Official Assignee's representative guided by *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* [1978] 2 MLJ 173 followed in *Sobri b. Arshad v. Associated Tractors Sdn. Bhd.* [1991] 3 CLJ (Rep) 756 takes the view that the petition is not valid because the affidavit of the truth of its contents was affirmed before it was presented.

With great respect, I do not share the view that the petition was invalid simply because the verifying affidavit was affirmed before the petition was presented. At worst there was nothing more than a formal defect or an irregularity. Accordingly ss. 131 and 93(4) of the Bankruptcy Act could be and were invoked. I entertained the application encl. (19) by which the petitioner sought to get over the apparent problem of there not being an affidavit verifying the petition after it was filed. I *inter alia* allowed the petitioner leave to file a fresh verifying affidavit.

It is s. 6(1) of the Bankruptcy Act 1967 that provides that a creditor's petition shall be verified by affidavit. This provision is repeated in r. 106(1) of the Bankruptcy Rules 1969. The equipollent r. 26 in the Companies (Winding-up) Rules 1972 provides that the affidavit verifying the petition for the winding-up of a company "shall be sworn after and filed within four days after the petition is presented". However, neither the said s. 6(1) of the Bankruptcy Act nor the said r. 106(1) of the Bankruptcy Rules (nor any other provision in the said Act and in the said rules thereunder) prescribes when the affidavit verifying the bankruptcy petition is to be sworn and filed.

In *Chin Yoon Timber Co.* (*supra*) the petition was a winding-up petition in respect of which the verifying affidavit was sworn and filed before the petition was presented. As has been seen the time for swearing and filing the affidavit in respect of a winding up petition is expressly prescribed. It has to be sworn after and filed within four days after the petition is presented. In the *Chin Yoon Timber Co.* judgment, reference was made to *Re Western Benefit Building Society* 55 ER 409 where in respect of similar winding-up provisions it was in effect held that the requirement to verify the petition was not met by an affidavit sworn to before the petition was presented. The judgment in *Chin Yoon Timber Co*. went on at p. 174 to purport to extend what was said in *Re Western Benefit Building Society:*

> The question of extension or abridgement, to which the rule relates, does not arise. The affidavit cannot therefore be said to relate to any proceedings. Extending what the Master of the Rolls said in the *Re Western Benefit Building Society*, you cannot verify to an unborn petition; a petition comes to life only when presented. The underlying general principle governing an affidavit is that it must be made in some cause or matter which is actually pending in the Court.

In *Sobri bin Arshad*, that passage from *Chin Yoon Timber* was cited with approval it being referred to as having been well put. *Re Western Benefit Building Society* an extension of which the above proposition was purported to be was also referred to in *Sobri bin Arshad:*

> It is trite law that an affidavit must be made in some cause or matter pending in Court. An affidavit cannot support an "unborn petition" as a petition comes to life only when presented. *In Western Benefit Building Society* [1864] 33 Beau. 368; 55 ER 409, Sir John Romly MR decided that an affidavit sworn before the presentation of the petition. "amounts to nothing". That case was followed in the local case of *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* ... I therefore agree with the submissions of the Counsel for the judgment debtor that the flaw in the proceedings hereinbefore mentioned vitiates the creditor's petition and cannot be cured by the discretionary powers of the Court ...

With respect I cannot accept the proposition that because the affidavit verifying the petition was sworn to before the petition was presented the effect was that the petition was vitiated. In winding-up petitions, r. 26 itself makes it clear that the petition has to be presented **before** the verifying affidavit is sworn. The presentation of the petition has to be and is an act independent of the verifying affidavit. Whether the affidavit was sworn before or after the presentation or whether it was sworn at all is of no consequence *vis-a-vis* the "birth" of the petition. On presentation it is born. The acts of swearing of the affidavit and the filing of it are by the terms of r. 26 post natal and not ante natal.

Where the verifying affidavit in contravention of r. 26 is sworn to before the petition is presented or is filed after the prescribed four days it is the affidavit (and not the petition) that amounts to nothing, which in fact was what was succintly stated by the Master of the Rolls in the said passage from *Re Western Benefit Building Society* that was quoted in *Sobri bin Arshad*. It is relevant to note that Sir John Romly, MR, having stated that the affidavit amounted to nothing, went on to state that such an affidavit sworn to before the petition was presented "must be re-sworn and the order dated subsequently" - clearly he found nothing wrong with the petition itself and was of the opinion that the omission of an affidavit sworn in terms required by the rule could be rectified by a re-swearing of the affidavit and that the order sought by the petition could be made thereafter. No doubt an order extending the time to file the verifying affidavit has to be obtained because of the four days prescribed by r. 26 and r. 193 empowers the Court to grant such an order in a proper case.

In *Sobri bin Arshad* a reference was made to *Sari Atlantic Sdn. Bhd. v. Aik Kim Enterprise* [1988] 1 MLJ 201 which was apparently cited by Counsel for the proposition that the Court could allow an extension of time to re-file the affidavit. The learned Judge failed to give any weight to that judgment because he understood the position to be that *Chin Yoon Timber Co.:*

> was not cited to or by the Court in the *Sari Atlantic* case

and for that reason held that that judgment:

> would appear to have been given ***per incuriam.***

I found that somewhat baffling in that in fact in the judgment in *Sari Atlantic Sdn. Bhd.*, *Chin Yoon Timber Co*. is discussed at some length before it appears to have been rejected in favour of assistance that the learned Judge found in the two cases in the English & Empire Digest that he referred to in his judgment one of them being *Re Western Pacific Building Society*. The learned Judge in *Sari Atlantic Sdn. Bhd.* also followed *Sam Hin Timber Co. v. Perusahaan Sri Duyong Sdn. Bhd.* [1983] 3 CLR 269 to hold that by rr. 193 and 194 of the Companies (Winding Up) Rules and s. 212(2) of the Companies Act the Court can and should cure what is merely a technical error amounting to an irregularity which does no injustice to the respondents which is what the Court in both *Sam Hin Timber* and in *Sari Atlantic Sdn. Bhd.* found that the premature swearing and filing of the verifying affidavit to be. In *Sam Hin Timber* the learned Judge stated at the paragraph marked No. 6 in the report:

> 6. In my view, the premature swearing or affirming of such an affidavit is a mere irregularity curable by granting an extension of time under r. 193 and compensating the victim of the irregularity with costs, because the company could not have been misled in any way, neither was there any real prejudice caused to the company. I could not find anything that could even remotely resemble any form of injustice to the company. Rule 193 no doubt, confers, from its wording, a discretion such that an applicant for extension of time is not bound to succeed as a matter of right. Here the applicant had filed an application, laying all the facts not lacking in candour before the Court, bearing in mind also the well known *dictum* that rules should be a handmaid rather than the mistress ...

Now apart from *Sobri bin Arshad* each of the judgments that has been referred to herein has been in respect of the swearing and/or filing of the affidavit verifying a petition to wind up a company the complaint in each case having been that there had been a contravention or non-adherence of r. 26 of the Companies (Winding-up) Rules 1972 which, as has been seen, expressly provides a time frame for the affidavit to be sworn and filed. *Sobri bin Arshad* and the instant case are bankruptcy proceedings. As has been seen, in bankruptcy proceedings no time frame is prescribed for the swearing and filing of the verifying affidavit.

In respect of bankruptcy petitions, r. 99(1) provides that "every petition shall be dated signed and witnessed." Rule 102 provides that:

> every bankruptcy petition shall be attested

and r. 106 provides that:

> a creditor's petition shall be verified by affidavit.

Out of pragmatic necessity the dating, signing and witnessing and attestation has to take place before the petition is filed. It follows that the reference to the petition in rr. 99(1) and 102 is a reference to an "unborn" petition. If that is so and it seems to be that it cannot but be so, I fail to see why the reference to the petition in r. 106 has to be construed differently as being a reference to the petition after it has been filed.

No doubt the rules committee saw a need to prescribe a time frame in respect of the affidavit verifying a petition to wind up a company. However the Minister empowered to make rules to carry into effect the provision of the Bankruptcy Act did not see a similar need in respect of the affidavit verifying a bankruptcy petition perhaps because he failed to see, as I with respect fail to see, that anything turns on whether the affidavit is affirmed before or after the petition is presented so long as it is clear that it is the contents of the petition that are being verified. That clarity was provided in the instant case by the petition in question being identified in the affidavit by the affidavit having the same title number as the petition (which number having earlier been allotted to the issue of the bankruptcy notice) and by having it attached to the affidavit.

It is relevant to note that it appears that in England before the rule providing the time frame for the swearing and filing of the verifying affidavit was prescribed (by the 4th of the General Orders of 11 November 1862 made under the Companies Act 1862) it apparently in fact was the practice to annex the verifying affidavit to the petition and which therefore had to be sworn before the filing of the petition (see the reference to this practice in the report of the decision in *Re Western Benefit Building Society).* In the judgment in *Sobri bin Arshad* reference was made as set out herebelow to another English decision more to the point in that it was in respect of a bankruptcy petition where the Court in fact held that a petition presented without a verifying affidavit would not be accepted:

a It would appear that the validity of the creditor's petition depends on there being filed in Court an affidavit verifying the truth of the allegations therein. So, for example, the case of *Anon* [1861] 5 LT 527 is authority for the proposition that every petition for adjudication of bankruptcy must be accompanied with an affidavit verifying the allegation therein or it would not be received.

b In my judgment it follows that although I had allowed the petitioner to re-swear the affidavit there was in fact no need for such re-swearing, in that the affidavit as it stood had duly met the requirements of the Act and the Rules in respect of the requirement to have the petition verified.

Also found at [1992] 1 CLJ 450

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